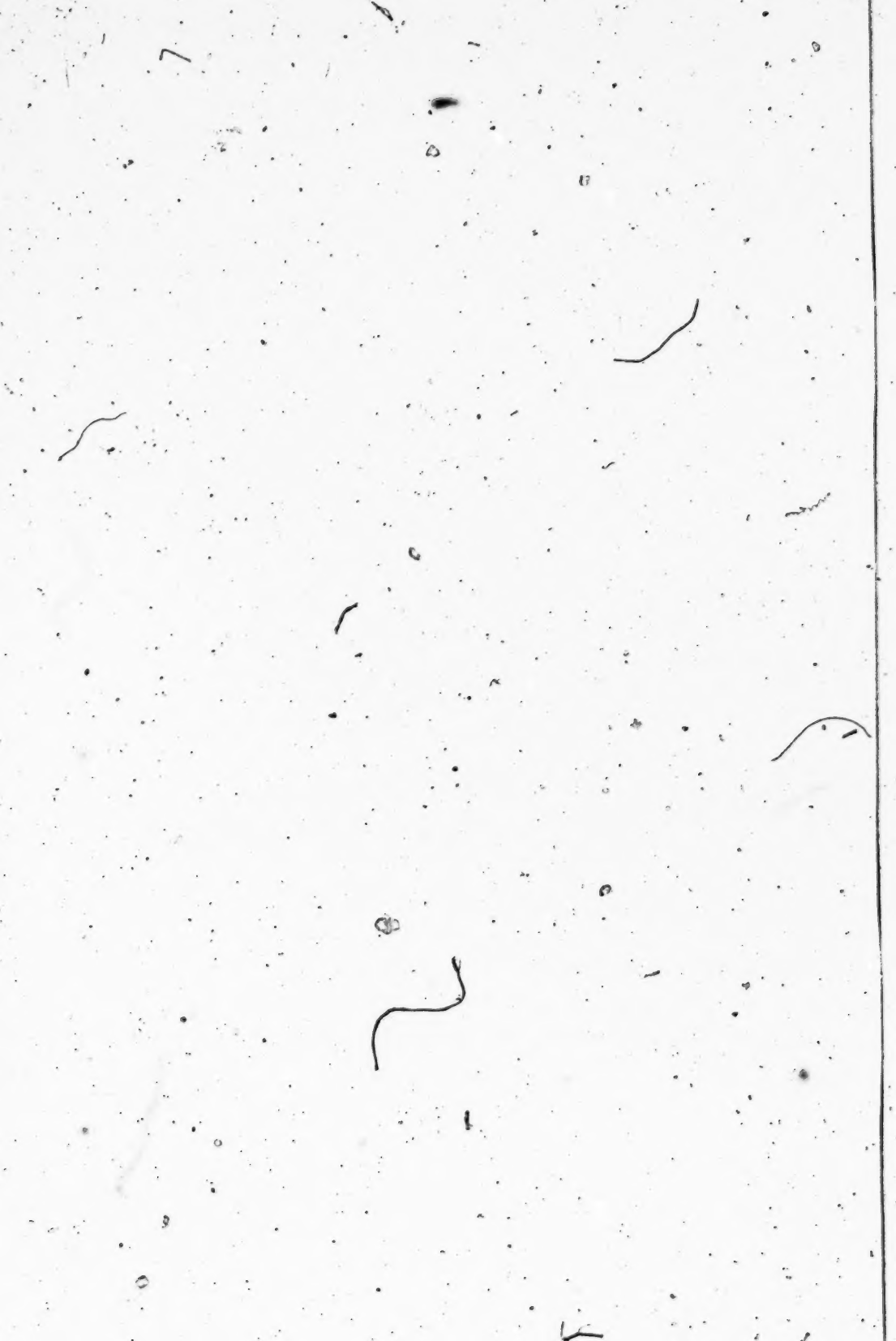

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 750

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF FOR THE PEOPLE OF THE STATE OF ILLINOIS, Amicus Curiae

INTEREST OF THE AMICUS CURIAE

Responsible prosecutors in virtually every state and federal jurisdiction are vitally concerned with the impact of *Bruton* v. *United States,* 391 U.S. 123 (1968), upon convictions secured prior to the date of the *Bruton* decision.

In this case petitioner Harrington would have this Court widen the impact of *Bruton* to disastrous breadths by (a) finding a *Bruton* error even where the defendant has been

afforded the right of confrontation (b) refusing to apply a harmless error rule or applying one so stringent as to create an impossible burden for the prosecution, while (c) persisting in its determination in *Roberts* v. *Russell,* 392 U.S. 293 (1968), that *Bruton* is to be applied retroactively to the States.

The Illinois experience in the wake of *Bruton* may be of value to this Court in light of the fact that the Illinois law was only slightly less stringent than that enunciated in *Bruton.* See *People* v. *Wilson,* 29 Ill. 2d 82, 193 N.E. 2d 449 (1963).

This experience demonstrates that the severest problems are created when *Bruton* is applied to convictions secured prior to the date *Bruton* was decided.[1] It indicates that *Bruton* must be limited in one or more ways: by overruling *Roberts* v. *Russell;* by limiting *Bruton* to cases where the co-defendant does not testify; or by applying a sensible harmless error rule which does not require reversal where there is no doubt of guilt.

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1. This is not to say that the application of *Bruton* to pending trials is without problems. The expense of separate trials is very heavy but the heaviest cost the society has to bear is the inconvenience borne by citizen witnesses and their resulting resentment and lack of confidence in the courts. In one typical case within counsel's experience, a shopkeeper was robbed by four men. Their statements resulted in the necessity of holding three trials. At the end of the second trial the shopkeeper, who had testified twice and would have to testify again, remarked to the prosecutor that, in the end, the courts would take more money from him than did the thieves.

ARGUMENT

I.

BRUTON V. UNITED STATES SHOULD NOT BE EXTENDED TO CASES IN WHICH THE CONFESSING DEFENDANT TESTIFIES AND IS AVAILABLE FOR CROSS-EXAMINATION BY HIS CO-DEFENDANT.

In considering whether *Bruton* v. *United States,* 391 U.S. 123 (1968), should be retroactive, this Court was required to estimate the potential impact of a retroactive application upon the orderly administration of criminal justice. *Linkletter* v. *Walker,* 381 U.S. 618, 636-38 (1965); *Stovall* v. *Denno,* 388 U.S. 293, 300 (1967). Unless the impact is to be recalculated and the decision in *Roberts* v. *Russell,* 392 U.S. 293 (1968), is to be reconsidered, it is critically important to limit *Bruton* to precisely what it held. In short, if the decision is made that the retroactive impact will not be so great as to require prospective-only application, the impact must not be broadened by a decision interpreting *Bruton* in a way unjustified by the *Bruton* opinion itself.

The *Bruton* decision specifically rests upon the right of confrontation. Again and again this Court emphasized that the prejudice occurred because the confessing co-defendant did not testify and subject himself to cross-examination, 391 U.S. 123, 125, 131-132, 134-135, 137. Heavy reliance was placed upon the Advisory Committee's comment to Federal Rule of Criminal Procedure 14: "This prejudice cannot be dispelled by cross-examination *if the co-defendant does not take the stand.*" 18 U.S.C.A. Rules 1-31 (1966 Revision) (emphasis supplied).

This was the rule of *Bruton* v. *United States* which was held retroactive—and no other. This was what led the Illinois Supreme Court to join the vast majority of other jurisdictions in holding *Bruton* inapplicable where the co-defendant testifies and subjects himself to confrontation and cross-examination:

> In *Bruton* the co-defendant Evans did not testify, but his out-of-court confession inculpating *Bruton* was introduced into evidence. The United States Supreme Court, in overruling the *Delli Paoli* case (352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294), held that because of the substantial risk that the jury, despite cautionary instructions to the contrary, would look to the incriminating extra-judicial statements in determining defendant Bruton's guilt, admission of Evans' confession violated Bruton's right of cross-examination secured by the confrontation clause of the sixth amendment. The Court stated at p. 126: "Plainly the introduction of Evans' confession added substantial, perhaps even critical, weight to cross-examination, *since Evans did not take the stand.* Petitioner thus was denied his constitutional right of confrontation" (italics added). It is evident from that statement reflecting the basis of the *Bruton* decision that the facts in *Bruton* are distinguishable, and the constitutional rights protected there are in no way involved in this case.
>
> Unlike the *Bruton* case, co-defendant Langusch did take the stand. . . .
>
> Thus defendants were not subjected to the risk of extra-judicial inculpating statements of a co-defendant, or deprived of any right of confrontation or cross-examination as involved in *Bruton.*

People v. Somerville, —— Ill. 2d ——, —— N.E. 2d —— (No. 40813, January 22, 1969).[2]

For a recent case to the same effect, see *Clark v. State,* 4 Cr. L. Rptr. 2450-51 (Md. Ct. Spcl. App., February 11, 1969).

In the instant case before the Court, the defendant Rhone, whose statement was the only one identifying petitioner Harrington by name, took the witness stand and gave extensive testimony concerning both the crime and his prior statement on direct examination (App. 384-90), on cross-examination by the prosecution (App. 390-403), on redirect (App. 403-405), and upon examination by the Court (App. 404-411). At that point the trial was recessed to give Rhone a chance to read a copy of the statement he made to the police and to resume the stand, if he chose. Rhone resumed the stand and testified under examination by the Court (App. 413-416). He was then cross-examined by counsel for defendant Bosby (App. 416-19) and by counsel for petitioner (App. 419-20). Under these circumstances the confrontation rationale of *Bruton* cannot apply.

II.

A SENSIBLE HARMLESS ERROR RULE SHOULD BE APPLIED WHERE VIOLATIONS OF BRUTON V. UNITED STATES HAVE OCCURRED.

Under *Delli Paoli* v. *United States,* 352 U.S. 232 (1957), the practice of admitting, subject to a cautionary instruc-

2. The opinion in *People* v. *Scott,* 100 Ill. App. 2d 433, 241 N.E. 2d 579 (1968), cited by respondent California (Brief p. 11), no longer represents Illinois law. The respondent could not have known this since the *Somerville* opinion is still unreported.

tion, the confession of a non-testifying defendant which implicates a co-defendant was considered *per se harmless.* Now Petitioner Harrington would have this Court deem the practice to be *per se harmful* and apply it to cases tried in an era when the practice was considered harmless.

The argument that *Bruton* v. *United States,* 391 U.S. 123 (1968), should not be subject to a federal harmless error rule comes too late. In *Gilbert* v. *California,* 388 U.S. 263 (1967), this Court clearly, albeit indirectly, decided that what is now known as a *Bruton* error could be harmless under the standard previously announced in *Chapman* v. *California,* 386 U.S. 18 (1967).

The California Supreme Court in *People* v. *Gilbert,* 63 Cal. 2d 690, 408 P. 2d 365, 371, 372 (1965), had been faced with the identical situation which later arose in *Bruton:* A's confession was *improperly* admitted against A. It contained references to B. The jury was cautioned not to consider A's confession as evidence against B. Following its decision in *People* v. *Aranda,* 63 Cal. 2d 518, 407 P. 2d 265 (1965), a precursor of *Bruton,* the California court held that the admission of the confession was error as to B, despite the cautionary instruction. However, the California court held that the error was harmless under a harmless-error rule comparable to the *Chapman* standard.

The case reached the United States Supreme Court just a short time before *Bruton.* This Court held that even if *Delli Paoli* were no longer good law (as it is clear from *Bruton* a majority of the Court believed), no reversible error was involved because the California Supreme Court had applied a harmless error rule which satisfied the requirements of *Chapman.* Hence, the Court implicitly decided that what is now known as a *Bruton* error can under

some circumstances be deemed harmless even under the federal standard.

The real problem faced by Illinois courts, and by others which consider it their duty to faithfully comply with the commands of this Court, is a dictum in *Chapman* v. *California,* 386 U.S. 18, 23 (1967) which seems to suggest that other "overwhelming evidence" is not to be an important factor in determining whether a particular constitutional error should be deemed harmless.

Thus in *People* v. *Smith,* 38 Ill. 2d 13, 17, 230 N.E. 2d 188, 191 (1967), in reversing a conviction because of a violation of the right to confrontation, the Illinois Supreme Court said that *Chapman* held that the "test of whether error is harmless is not whether there is other evidence of guilt or even whether other proof of guilt is overwhelming."

We respectfully submit that lower courts must be freed from the bonds of the dictum in *Chapman.* Any rational harmless error rule, whether applied in civil cases or in criminal cases, whether the error is of constitutional or of non-constitutional dimensions—must make the weight of the properly admitted evidence a highly relevant factor in making the calculation of whether the error was harmful. This is especially true where the error was committed in good faith reliance upon a then prevailing decision.

Subsequent to *Chapman* both this Court and lower federal courts have recognized this in criminal cases involving error of a constitutional dimension. For example, in remanding *Wade* v. *United States,* 388 U.S. 218, 242 (1967), this Court indicated that if the in-court identification was found to be tainted by the constitutionally infirm line-up identification, the trial court would then be required to determine whether the error was harmless

according to the *Chapman* standard. In other words, the constitutionally improper admission of an eye-witness identification—despite its obvious probative force, which no jury could simply ignore—*could* under some circumstances meet the federal constitutional standard for harmless error. This obviously would only be so because the rest of the evidence was, by itself, overwhelming, so that a guilty finding was the only proper verdict.

The Court in *Gilbert* v. *California,* 388 U.S. 263, 268 (1967), even more specifically indicated that the overwhelming nature of the other evidence is highly relevant to a determination of whether a constitutional error can be deemed harmless. There the Court was satisfied that what later came to be known as a *Bruton* error was harmless. However, since evidence of the out-of-court identification had been improperly admitted, the Court directed that upon remand the significance of the error should be recalculated since once evidence of the line-up was suppressed, the case had become weaker. In other words, the harmfulness of the *Bruton* error depended upon the strength of the rest of the government's case.

Other federal courts in a variety of post-*Chapman* case involving violation of federal constitutional rights have been satisfied that the errors were harmless. The standards they have emphasized are (1) the cumulative nature of the erroneously admitted evidence, that is proof of the same fact by two means, only one of which is improper and (2) the weight of evidence establishing other facts which abundantly demonstrate guilt. See for example:

Ware v. *United States,* 376 F. 2d 717, 718-19 (7th Cir. 1967), violation of right to confrontation held harmless;

McKissick v. *United States;* 379 F. 2d 754, 762 (5th Cir. 1967), violation of right to confrontation said to be among violations which could be harmless;

United States v. *Reed*, 392 F. 2d 865, 867 (7th Cir. 1968) and *Thompson* v. *United States*, 382 F. 2d 390, 394 (9th Cir. 1967), physical evidence unlawfully seized and introduced held subject to the harmless error rule of *Chapman*;

Boeckenhaupt v. *United States*, 392 F. 2d 24, 28 (4th Cir. 1968), application of the harmless-error rule to improper comment at trial on the defendant's decision to invoke the Fifth Amendment self-incrimination privilege;

United States v. *Barnes*, 383 F. 2d 287, 295 (6th Cir. 1967), deeming harmless a constitutional violation related to pretrial publicity.

In short, the People of the State of Illinois urge that this Court make clear what is implicit in its decisions in *Wade* and *Gilbert* and in the decisions of the federal circuit courts: convictions should not be upset if the reviewing court in considering all properly admitted evidence finds no doubt about the appellant's guilt.

The alternative is slavish adherence to the dictum in *Chapman* which led to the very unfortunate result in *People* v. *Armstrong*, 41 Ill. 2d 390, 243 N.E. 2d 825 (1968), where the Illinois Court, having been cited to its interpretation of *Chapman* in *People* v. *Smith*, 38 Ill. 2d 13, 17, 230 N.E. 2d 188, 191 (1967), *supra*, without mentioning *Chapman* or *Smith*, felt itself "forced" to reverse because of a *Bruton* error. In Armstrong four eye witnesses positively identified Armstrong as the fellow in a brown jacket who held a shotgun while robbing three taverns in the same vicinity within a forty-five minute period. Two of these witnesses had watched while Armstrong fired his shotgun and while a companion fired a pistol, killing a patron in the course of the third robbery. It was undisputed that the patron, an off-duty policeman, had been able to return one shot before dying. It was

also undisputed that Armstrong had been wounded on the night in question. Armstrong's companions, Sumlin and Rhodes, were also positively identified by the witnesses. This was probative against Armstrong, since a friend of Armstrong testified that Armstrong had left a certain apartment with Sumlin and Rhodes prior to the crime spree and had returned with them just after the shooting. This same friend saw Armstrong with a shotgun and a pistol just after the shooting. The next day the weapons were found in Armstrong's apartment. Expert testimony proved that the fatal shot came from one of the weapons found in Armstrong's apartment.

In the face of all this evidence, defendant Armstrong, like his co-defendants, offered no defense and no alibi. It is fair to say that he was merely putting the State to its proof and gambling (successfully) that the jury would not recommend the death penalty, after findings of guilty. Considering the relative ages of the defendants and the prior criminal record of Armstrong, the trial judge adjudged Armstrong "the most culpable under all the circumstances" and imposed upon him the stiffest sentence.

Under the compulsion of *Bruton* and *Chapman* the Illinois Supreme Court reversed as to Armstrong because his friend testified that one of the co-defendants, while Armstrong was in another room immediately after the shooting, mentioned the shooting and implicated Armstrong. See *People* v. *Armstrong,* 41 Ill. 2d 390, 243 N.E. 2d 828 (1968), and the companion case, *People* v. *Rhodes,* 41 Ill. 2d 494, 244 N.E. 2d 145 (1969).

As a result while the less culpable defendants are serving lengthy prison terms for their participation in the felony-murder, no one having the slightest doubt about their guilt, their leader and companion Armstrong—whose

guilt has been established to a moral certainty—will go unpunished for his murder unless the State can gather together its evidence, some of which is stale, and secure a new conviction.

Thus even though Illinois recognizes that a *Bruton* error could be harmless [see *People* v. *Armstrong*, 41 Ill. 2d 390, 243 N.E. 2d 825, 831 (1968)] the federal harmless error rule, because of a dictum in *Chapman*, is so stringent as to result at least in a waste of resources and possibly in a miscarriage of justice.

This Court should carefully enumerate the factors to be considered in determining whether an error is harmless. The overwhelming weight of evidence of guilt is clearly an element militating against a finding of reversible error. If the offending piece of evidence is merely cumulative, that fact is also significant. And of great significance is the nature of defense offered by the defendant. If, as was the case in Armstrong and as is the case with Harrington (App. 384-86), the defendant does no more than put the State to its proof, a Court should be extremely reluctant to find harmful an error in the admission of evidence if there is other persuasive evidence of guilt.

The resolution of problems of harmless errors neither yields to nor requires abstractions or verbal totems. A reviewing court has the complete record of trial before it and ask itself only whether, excluding the improper evidence, the verdict of guilty was fair and proper and supported by the overwhelming weight of evidence. When all the evidence is before the court, no abstractions are necessary. The application of simple common-sense rules will do. And a rule which does not consider either the overwhelming weight of evidence or the nature of the

defense is devoid of common sense. This Court should announce that *Chapman* v. *California* is applicable to *Bruton* errors and that it is not to be interpreted to require reversal where the properly admitted evidence is so overwhelming as to leave no doubt about guilt.

III.

THE DOCTRINE OF BRUTON V. UNITED STATES SHOULD BE APPLIED PROSPECTIVELY ONLY AND ROBERTS V. RUSSELL SHOULD BE RECONSIDERED AND OVERRULED.

Even if *Bruton* v. *United States,* 391 U.S. 123 (1968), is not distorted to extend to cases where the confessing co-defendant testifies, and even if this Court fulfills its promise in *Gilbert* to apply a sensible harmless-error to *Bruton* errors, the impact of a retroactive application of *Bruton* will be significant. *Roberts* v. *Russell,* 392 U.S. 293 (1968), should be reconsidered. The issue is simply too important to be resolved in a per curiam decision without the issues being fully and adequately briefed and argued.

The cornerstone of the "prospective-only" doctrine—in overruling prior precedents in the common-law, in changing long-standing interpretations of statutes, and in rejecting prior decisions in the field of constitutional criminal procedure—is justifiable reliance upon the old decisions. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 502-03 (1968). Cardozo, Address, 55 Rep. N.Y. State Bar Assn. 263, 294 (1932).

To say that reliance is not justifiable because the old decision was under attack—as this Court said in *Roberts* v. *Russell,* 392 U.S. 293, 295, is to ignore the entire history

of the "prospective-only" doctrine. The classic example of that doctrine's use is as an accompaniment to decisions abolishing immunity for charitable organizations or for the sovereign. See for example, *Darling* v. *Charleston Community Hospital,* 33 Ill. 2d 326, 211 N.E. 2d 253 (1965). Such abolition *always* has occurred only after many years of repeated attacks upon the old rule of immunity. Yet courts have not, therefore, concluded that reliance upon the old rule was unjustified so as to preclude the invocation of the prospective-only doctrine.

Wolf v. *Colorado,* 338 U.S. 25 (1949), was under strong attack in the decade which followed that decision. Nearly half of the States had adopted exclusionary rules. See *Linkletter* v. *Walker,* 367 U.S. 618, 633 (1965). Yet it was the overruling of *Wolf* which first prompted this Court to use the justifiable reliance doctrine in order to make prospective-only a decision in the area of the Bill of Rights. The number of states which had completely rejected *Delli Paoli* before *Bruton* is insignificant in itself and by comparison to the number which had rejected *Wolf* before *Mapp* v. *Ohio,* 367 U.S. 643 (1961), was decided.

Indeed, the tenor of the state opinions rejecting *Delli Paoli* indicates that the State considered the rule to be purely federal in scope. Those jurisdictions which relied on *Delli Paoli* had a double reason to do so. The first was that *Delli Paoli* was in accord with state law and the second was that, even if *Delli Paoli* were not in accord, the federal rule would not govern state procedure.

The opinion in *Roberts* v. *Russell* apparently concedes that larger numbers of convictions will be affected by a retroactive application of *Bruton.* Compared to the numbers involved in a retroactive application of *Bloom* v. *Illinois,* 391 U.S. 194 (1968), the number of cases here in-

volved is huge. See *DeStefano* v. *Woods*, 392 U.S. 631 (1968). We would add only that the kinds of cases affected are likely to involve serious crimes and professional criminals. *Bruton* benefits only criminals who have acted in concert with others to perform their wicked deeds. Certainly convictions in major federal cases—where multiple defendants were the order of the day—are jeopardized by *Roberts* v. *Russell*. Important state convictions are also at stake. For instance, in an appeal now pending, *Bruton* is being used as a basis for attacking one of the most important convictions ever secured against organized crime by state and local officials in Illinois. *People* v. *Bravos*, et al. (No. 52545, Illinois Appellate Court, First District).

Finally the People of the State of Illinois respectfully take issue with the Court's suggestion that the practice followed in *Delli Paoli* undermines the reliability of the adjudication of guilt. Rather, we are dealing with a voluntary confession of A which implicates B. The confession was admitted only because it had the reliability of a voluntary statement and had probative value against A. In short, it is much like a voluntary confession given without *Miranda* warnings. Just as *Miranda* was held non-retroactive because the statements admitted in pre-*Miranda* trials were not unreliable, so also should *Bruton* be held non-retroactive because, even if the jury considered the statements in question as evidence against a non-confessing co-defendant, the statements that they considered were reliable evidence. Like *Mapp* and *Miranda*, in the interest of promoting other values, *Bruton* defeats truth more often than it promotes it. This is precisely what Justice Learned Hand meant when he said that although the kind of practice involved in *Delli Paoli* rests upon a fiction, that practice "probably furthers, rather

than impedes, the search for truth . . ." *Nash* v. *United States,* 54 F. 2d 1006, 1007 (2nd Cir. 1932). This is precisely what the California Supreme Court, which reached the "*Bruton* result" before your Honors overruled *Delli Paoli,* stated: "Our ruling (in *Aranda*), however, did not stem from a belief that the former procedure created a grave risk of convicting innocent defendants . . ." *People* v. *Charles,* 57 Cal. Rptr. 745, 425 P. 2d 545, 547 (1967).

Under very recent decisions of this Court, where the reliability of past convictions is not in doubt, a new decision should not be given retroactive effect. *Linkletter* v. *Walker,* 381 U.S. 618, 637-38 (1965); *New Jersey* v. *Johnson,* 384 U.S. 719, 728-29 (1966); *Stovall* v. *Denno,* 388 U.S. 293, 295 (1967).

CONCLUSION

The People of the State of Illinois, as amicus curiae, respectfully request that the judgment of the California Court of Appeal in the instant cause be affirmed.

Respectfully submitted,

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